OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 95-30 April 3, 1995

TO: All Regional Directors, Officers-in- Charge and Resident Officers

FROM: William G. Stack, Associate General Counsel

SUBJECT: Procedures to be Followed in Light of D.C. Circuit Court Decision in Drug Plastics & Glass Company, Inc., 148 LRRM 2334 (D.C. Cir. 1995)

On January 27, 1995 the D.C. Circuit denied enforcement of the Board's Order in Drug Plastics & Glass Company, Inc., 309 NLRB 1306 (1992) reversing an earlier decision in favor of the Board.[1] The court found that the Board lacked jurisdiction over the complaint allegations found to be violative of the Act because they were not closely related to the charge allegations and were therefore barred under Section 10(b) of the Act.

In light of the court's decision, guidance given in OM 94-88 must be modified. In OM 94-88 the D.C. Circuit Court's decision in Lotus Suites Inc., d/b/a Embassy Suites Resort , 32 F.3d 588 (D.C. Cir. 1994) was discussed. Because at that time, the D.C. Circuit had apparently accepted the Board's finding that the complaint allegations were closely related to the charge allegations in Drug Plastics, 309 NLRB No. 1306 (1992), Regions were advised that as long as the complaint allegations were closely related to factually specific (as opposed to boilerplate) charge allegations, there was no need to further amend the charges. The D.C. Circuit's most recent decision in the case requires modification of that advice.

In Drug Plastics the Union filed a charge on July 15, 1991 alleging:

> The above named employer unjustly terminated Allen Rich Matthews because of his union activities and support of the union effort in the above named plant. Allen Rich Matthews was discharged on April 26, 1991.

A complaint issued in September 1991 alleging several Section 8(a)(1) violations which had occurred in January and February 1991 during an unsuccessful organizing campaign but which had not been alleged in the charge. The Board affirmed the ALJ's findings of violations in the threats of plant closure and discharge, solicitation of grievances and threats of surveillance. The Board also affirmed the ALJ's dismissal of the 8(a)(3) termination and other 8(a)(1)

[1] 30 F. 3d 169 (D.C. Cir. 1994).

allegations. The Board found that the allegations of the complaint were closely related to the charge as all events underlying the allegations arose out of the Employer's overall plan to resist the Union which continued even after union organizing ceased, the conduct generally occurred during the same time period as the 8(a)(3) allegation, the alleged discriminatee Matthews was a witness to several of the alleged discriminatory statements and the allegations asserted substantial union animus and therefore related to the discharge allegation. 309 NLRB at fn 2.

The court accepted the Board's test for determining relatedness[2] but found that the Board's application of the test in Drug Plastics was inconsistent with its application in Nippondenso Mfg. U.S.A., Inc., 299 NLRB 545 (1990) where the Board reached a different result based on a factually similar scenario. Significantly, the court held that the relatedness of the charge and the complaint should be evaluated as of the time of the allegations. Thus, the fact that the single allegation of the charge was ultimately dismissed did not affect the court's decision. The court found, however, that the only factual relatedness shown between the charge and complaint allegations was that they involved conduct which occurred during the same time period (i.e. January through April 1991) and both allegations bear on anti-union animus. The court concluded that, under Nippondenso, this was insufficient to establish the relatedness necessary to satisfy Section 10(b).

As all respondents can seek review in the D.C. Circuit, it is important to be sensitive to the court's ruling in this case.[3] Consistent with the Board's rules and regulations 102.12(d) and guidance set forth in the Casehandling Manual at 10020.1, the following procedures should be followed to prevent Board decisions from being set aside on this basis in the future. As previously noted in OM 94-88, Regions should not proceed to complaint on charges based exclusively on boilerplate statutory language. When taking charges through the I.O. program,

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[2] That test requires the Board to look at whether the allegations involve the same legal theory, whether the allegations arise from the same factual situation or sequence of events and finally whether the respondent would raise the same or similar defenses to the allegations. Nickles Bakery, 296 NLRB 927,928 (1989). See also Redd-I, Inc., 290 NLRB 1115, 1119 (1988).

[3] See also Reebie Storage and Moving Company, Inc. v. NLRB, Nos 93-4060 and 94-1225 (7th Cir.) reversing 313 NLRB 510 (1994). In Reebie, the 7th Circuit rejected the Board's finding that a Section 8(a)(3) allegation that the employer encouraged union membership by applying the terms of the agreement to union employees only was closely related to an 8(a)(5) charge allegation of a refusal to provide a request for information concerning all employees in the unit in order to determine compliance with the contract. The court's majority found the 8(a)(3) allegations rested on different statutory provisions and different legal theories from the 8(a)(5) charge allegation. Nor, in the court's view, was there evidence that the Union had requested the information in order to uncover practices benefiting union members.

Regions should inquire specifically of the charging party if there is conduct other than what is initially complained of, which needs to be investigated. Though we do not want to encourage frivolous charges, it makes sense to include all allegations of which the charging party is aware at the time of the charge.[4] If the Board agent did not take the charge, in the initial discussions regarding the case, the agent should inquire as to whether there is other allegedly unlawful conduct which will need to be investigated. If so, depending on the timing of the alleged conduct, a decision should be made as to whether to amend the charge at that point, rather than waiting till after the investigation.[5]

When new allegations are uncovered in the investigation the charge should be amended to reflect those allegations, even if the Region believes the allegations are closely related. While the amendments to the charge do not have to be plead as specifically as the complaint allegations, the amendments must be factually specific enough to pass muster under Lotus Suites (i.e. the amendment cannot simply repeat statutory language).

For example, if the Regional investigation uncovers several allegations of threats of discharge, plant closure and unspecified reprisals made from October 4, 1994 to December 12, 1994 the Region could amend the charge to state: "Since on or about October 4, 1994, the Employer has threatened its employees on numerous occasions by, inter alia, threatening discharge, threatening employees with plant closure and threatening employees with unspecified reprisals in order to discourage their support for the Union."

In addition, If the amendment involves conduct occurring more than 6 months prior to the amendment, the Region should allege perhaps in an introductory paragraph in the complaint the factual nexus between the original charge and the amended charge allegations.[6] Finally, on many occasions additional Section 8(a)(1) allegations are uncovered while preparing for trial. If such allegations are uncovered, the charge should be amended if it raises new categories of violations, i.e. interrogations. If it is not feasible to amend the charge the complaint should be amended not only to allege the conduct, but also to allege why the additional allegations are closely related to the charge.

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[4] Because an individual charging party may be less likely to understand the significance of the context of other events surrounding his/her allegation, it may be even more essential to probe at the time of the charge-filing when the charging party is an individual.

[5] If charges are filed late in the 10(b) period, the Region may want to consider prioritizing the investigation, so that the investigation can be completed within the 10(b) period and the charge amended in the event new allegations are uncovered.

[6] If a dismissal is appealed and there is a possibility that Section 10(b) would preclude complaint on specific allegations if the appeal were upheld, the Region should take an amended charge to protect those allegations.

If you have any questions about these procedures, please contact me or your Assistant General Counsel.

W.G.S.

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